No. 87-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Appellants' jurisdictional statement in this case.[1]

Amicus Tax Executives Institute, Inc. (TEI) is a voluntary, nonprofit association of corporate and other busi-

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[1] Tax Executives Institute has requested and received the written consent of the Appellants and Appellee to the filing of this brief; those consents have been filed with the Clerk of the Court.

ness executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,000 members who represent more than 2,000 of the leading corporations in the United States and Canada. TEI members represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

This case addresses the extent to which a State may eviscerate a decision by this Court that a state tax statute unconstitutionally infringes upon interstate commerce by choosing to apply that decision on a prospective-only basis. Last term, in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), the Court invalidated the multiple activities exemption of Washington State's business and occupation (B&O) tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Washington Supreme Court, applying the standard set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), concluded that the Court's finding of unconstitutionality should apply on a prospective-only basis and consequently denied the Appellants' claims for refund in respect of the unconstitutionally imposed and collected taxes.[2] 109 Wash. 2d 878, 749 P.2d 1286 (1988), *reprinted in* Ap-

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[2] The Court in *Tyler Pipe* concluded that since the refund isues "are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce," they were appropriately considered in the first instance by the Supreme Court of Washington. 107 S. Ct. at 2823, *quoting Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).

pendix A to Appellant's Jurisdictional Statement (App.). It is that conclusion which Appellants—National Can Corporation and 70 other taxpayers—seek to have reviewed.

Tax Executives Institute supports the Appellants' jurisdictional statement because its members have a vital interest in the resolution of the prospective-only issue. A decision by the Court in this case promises to affect far more than the State of Washington's ability to retain the unconstitutional taxes it has collected from a discrete class of taxpayers. The Institute is concerned that the Washington court's decision, if not clarified, could substantially dilute the protection intended by the Commerce Clause. If the Court declines to note probable jurisdiction in this case, courts and legislatures in other States may well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned—*see, e.g., American Trucking Associations v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark. Mar. 14, 1988) (amended Apr. 26, 1988), *to be reported at* 295 Ark. 43, 746 S.W.2d 377 (1988) (the Court's finding of unconstitutionality in *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987), will be applied on a prospective-only basis).

Obversely, if the Court notes probable jurisdiction and clarifies the standards to be used in determining the retroactive effect to be given to decisions holding tax statutes to be unconstitutional, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

Because TEI members and the companies by whom they are employed would be materially and adversely

affected by the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Washington court's decision, the Institute has a special and direct interest in the outcome of this case.

ARGUMENT

I.

The constitutionality of the State of Washington's business and occupation tax has been a matter of dispute for more than 40 years. In 1948, the Washington Supreme Court held that the B&O tax then in effect (which contained a wholesale tax exemption for local manufacturers) discriminated against interstate commerce and therefore violated the Commerce Clause of the Constitution. *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948). In an effort to address the state court's concerns, the Washington legislature two years later turned the statute "inside out."[3] The amended statute, however, was ultimately found to have "essentially the same economic effect on interstate sales . . . [while having] the advantage of appearing nondiscriminatory." *General Motors Corp. v. Washington*, 377 U.S. 436, 460 (1964) (Goldberg, J., with Stewart and White, JJ., dissenting),[4] *quoted with approval in Tyler Pipe*, 107 S. Ct. at 2815. Last term, in *Tyler Pipe*, the Court confirmed

[3] As described by the Court in *Tyler Pipe*, "[t]he legislature removed the wholesale tax exemption for local manufacturers and replaced it with an exemption from the manufacturing tax for the portion of manufacturers' output that is subject to the wholesale tax." 107 S. Ct. at 2814 (footnote omitted).

[4] In *General Motors*, a divided Court rejected the taxpayer's claims that the statute unconstitutionally taxed unapportioned gross receipts and did not bear a reasonable relation to the taxpayer's in-state activities; the Court did not reach the argument that the tax imposed multiple burdens on interstate transactions. 377 U.S. at 449.

that the effect, not the mere appearance or form, of the tax scheme was controlling and therefore invalidated the multiple activities exemption from the B&O tax as constitutionally repugnant. In doing so, the Court expressly relied on its 1984 decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), writing:

> Washington's multiple activities exemption discriminates against interstate commerce as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco*.

107 S. Ct. at 2820.[5]

The Court in *Tyler Pipe* did not reach the issue of the prospective effect to be given to its holding and, hence, the disposition of the taxpayers' claims for refund. Characterizing those issues as ones of remedy, the Court remanded the case to the Washington Supreme Court "to address in the first instance the refund issues raised by our rulings in these cases." 107 S. Ct. at 2823. The Washington court concluded that this Court's decision should apply on a prospective-only basis. If that decision is not reviewed and the standard governing the retroactivity issue is not clarified, other States may conclude that they are free to deny refunds in all similar cases. Such a result could frustrate the policy underlying the Commerce Clause by allowing the States to enjoy the financial benefits of their discriminatory taxation—the fruits of their own unconstitutional acts.

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[5] *Armco* involved a West Virginia tax identical in principle to the Washington B&O tax. West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale; local manufacturers were exempt from the tax because they paid a manufacturing tax on the value of products manufactured in the State. The Court invalidated the statute, thereby reinforcing the principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642.

II.

Although the Constitution neither prohibits nor requires retrospective effect, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), the rule remains that "a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). *See* L. Tribe, *American Constitutional Law* 29-30 & n.20 (2d ed. 1988). Thus, although exceptions to the rule of retroactivity should be recognized as a matter of policy, the exceptions should not swallow the rule.

In respect of civil cases, the factors to be analyzed in resolving the retroactivity issue were set forth by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[6] In that case, the Court held that in determining whether a decision should be accorded prospective-only treatment, the following three factors should be considered:

- *Reliance*: Whether the decision establishes a new principle of law or involves an issue of first impression whose resolution was not clearly foreseen.
- *Purpose*: Whether, based on the history of the rule in question, its purpose and effect, nonretroactive application will advance or retard the operation of the new rule.
- *Inequity*: Whether nonretroactive application is necessary to avoid injustice or hardship.

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[6] In *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), which changed the analysis to be used in criminal procedure cases, the Court stated that *Chevron* continued to govern civil cases. 107 S. Ct. at 713 n.8. The *Chevron* case, however, did not involve the retroactive effect to be given to a ruling of *unconstitutionality*. Rather, the case addressed the reach of a decision that Louisiana's statute of limitations governed claims for personal injuries sustained on the Outer Continental Shelf off the coast of Louisiana. In *Chevron*, the Court held that its decision, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to litigants who had relied on several federal cases holding that admiralty law (specifically, the doctrine of laches) controlled the issue. 404 U.S. at 109.

404 U.S. at 106-07. *See* Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 138-39 (1987).

The Supreme Court of Washington construed *Chevron* to permit the application of *Tyler Pipe* on a prospective-only basis. In doing so, the court transmogrified the three-part test of *Chevron* into a standard so pliable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis.

Consider, for example, *Chevron*'s threshold requirement that the decision at issue must establish a new principle of law before it can be applied on a prospective-only basis.[7] The principle that discrimination against interstate commerce in the exercise of local taxing authority is constitutionally proscribed is far from new. Even before *Armco*, this Court had clearly ruled that the Commerce Clause proscribed tax statutes treating interstate businesses less favorably than local businesses. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331-32 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) ("[t]he common thread running through the cases upholding compensatory taxes is the equality between local and interstate commerce," *citing Boston Stock Exchange* and *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-84 (1937)).

These precedents notwithstanding, the Washington court nimbly concluded that *Tyler Pipe* represented a clear break from prior rulings (including *Armco*), even though the Court in *Tyler Pipe* expressly relied on those rulings. App. 5a; *see* 107 S. Ct. at 2816, 2820. In reach-

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[7] The court below correctly noted that if the reliance ("new principle") requirement is not met, the decision must be applied retroactively; *Chevron*'s other two factors need not be considered. App. 4a. *See United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982).

ing this result, the court cited its own ruling in *National Can Corp. v. Department of Revenue*, 105 Wash. 2d 327, 715 P.2d 128 (1986), as evidence that *Armco* did not foreshadow the result in *Tyler Pipe*. App. 5a. It was that decision, however, which *Tyler Pipe* reversed![8] To conclude that a State's own misreading of precedent relieves it of its responsibility to follow that precedent would itself represent a "clear break" from sound and established principles of adjudication and could send a disturbing signal to other States: perhaps ignorance of the law *is* an excuse.[9]

With equal aplomb, the Washington court concluded that the purpose of the Commerce Clause would not be enhanced by the retroactive application of *Tyler Pipe*. App. 13a. The court blithely stated: "It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate commerce is in the past . . . ." App. 11a. Under such a reading of *Chevron's* purpose test, a ruling of unconstitutionality would never be applied retroactively and the States would have an incentive to enact unconstitutional statutes.[10] The overall result, therefore, would be to retard the purpose of the Commerce Clause.

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[8] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141 (the result in *Tyler Pipe* "was clearly foreshadowed by the Supreme Court's decision in *Armco*").

[9] *See Chapman v. California*, 386 U.S. 18, 21 (1967) (criminal procedure case) ("we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

[10] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141-42 ("the practical effect [of prospective-only application] would be to permit states the financial benefits of discriminatory taxation. A state could enact tax laws without concern for constitutional limitation, knowing that, if such laws were ultimately found to discriminate against

The Washington court's analysis of the inequity test in *Chevron* is especially beguiling. Under *Chevron*, the issue is whether prospective application is necessary to avoid injustice or undue hardship. In applying the test, the court below focused on the State of Washington's reliance on the unconstitutionally imposed and collected taxes, stating that "the expenditures made from this revenue . . . cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements." App. 15a.

If such a "hardship" were deemed sufficient to justify prospective treatment, however, unconstitutional tax statutes would rarely, if ever, be overturned retroactively. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from retroactive application of a decision. Under such an analysis, a different result obtains, for the "hardship" of which the State complains is one of its own making—the result of its own unconstitutional acts.[11]

In this regard, it is instructive to consider those cases in which the Court has provided relief under the inequity

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interstate commerce, they could be repealed with impunity. . . [T]he prospective application of a finding of unconstitutionality retards the purpose of the commerce clause by offering the inducement of clear financial advantage to those states that violate it.").

[11] The "hardship," moreover, could have been substantially mitigated had the State heeded the advice of its own Director of Revenue who, two days after this Court's decision in *Armco*, advised the Governor that "the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement . . . ." Memorandum to the Honorable John Spellman, Governor, from Donald R. Burrows, Washington State Director of Revenue (June 14, 1984), *reprinted in* App. 80a (Exhibit F). Had the Director's concern been acted upon, the collection of unconstitutional taxes could have ended more than three years before the Court's decision in *Tyler Pipe*. Instead, the State continued its efforts to enforce the discriminatory taxes in violation of the Commerce Clause, thereby exacerbating the "hardship" of which it now complains.

prong of the *Chevron* test (or comparable standards). For example, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), the Court limited the effect of its decision two years earlier in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), which invalidated, on First Amendment grounds, a Pennsylvania statute authorizing State reimbursement to private sectarian schools for certain educational services provided by the schools. The hardships of which the Court was concerned in that case were not the State's but rather the schools that had provided services and incurred expenses in reliance on the constitutionally defective statute. 411 U.S. at 203. (Indeed, the State would have been relieved of a financial burden had the Court applied its decision on a retroactive basis.) Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court limited the retroactive effect of a decision holding unconstitutional a Louisiana statute permitting only property taxpayers to vote on elections called to approve the issuance of public utility revenue bonds. The hardship addressed by the Court was again not the State's but rather that which would have been suffered by cities and bondholders (who had relied on the state law) had the decision been applied retroactively. 395 U.S. at 706.[12]

Even assuming a State could demonstrate that it would suffer an undue hardship if compelled to refund immediately all unconstitutionally collected taxes, it does not follow—as the Washington court concluded—that the

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[12] *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (decision holding the Bankruptcy Act of 1980 unconstitutional applied prospectively because of the substantial injustice and hardship that would otherwise be visited upon litigants who had relied on the statute); *Los Angeles Department of Water and Power v. Manhart*, 422 U.S. 702, 722-23 (1978) (decision that city department's employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended, applied prospectively because of "devastating" effect retroactivity could have "in large part on innocent third parties"—covered employees).

wronged taxpayers should receive nothing.[13] In appropriate cases, the State might—perhaps under guidelines prescribed by the legislature—craft a refund policy that minimizes the "inequity" the State might otherwise suffer. For example, a State might provide that the taxes unconstitutionally collected (plus an interest factor) could be claimed as a credit on the affected taxpayers' future years' tax returns.[14]

In summary, the Washington court misapprehended all three of the tests set forth in *Chevron*. Its analysis of *Chevron*, if not clarified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious—nullifying the Court's decision in *Tyler Pipe* and frustrating the policy underlying the Commerce Clause.

III.

The questions presented by this case are substantial not only because the Washington court's decision threatens to eviscerate this Court's holding in *Tyler Pipe*, but because the Washington case is but one recent example of the States' misconstruing both the requirements of the Commerce Clause and the standard set forth in *Chevron*. Indeed, during the past five years, there has been a veritable wave of state court decisions in which discriminatory statutes have been found, in essence, to be unconstitutional on a prospective-only basis.

For example, the State of West Virginia is now contending in the remand of *Ashland Oil, Inc. v. Rose*, 350

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[13] Obviously, the hardship that would be suffered by the State in such an instance would be no greater than the hardship collectively suffered by the taxpayers from whom the taxes were unconstitutionally exacted.

[14] Tatarowicz, *supra*, 41 Tax Lawyer at 143 & n.248. Alternatively, the taxes at issue could be refunded in installments. 41 Tax Lawyer at 143.

S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 U.S. 1949 (1987) (remand pending), that this Court's decision in *Armco* should be applied only to Armco. Similarly, many states have refused to give effect to, and are refusing to pay refunds, under the Court's decision in *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987). *See, e.g., American Trucking Associations v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark. Mar. 14, 1988) (amended Apr. 26, 1988), *to be reported at* 295 Ark. 43, 746 S.W.2d 377 (1988). Another example is *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, No. 70,368, 13 Fla. L.W. 120, 1988 Westlaw 12553 (Fla. Feb. 18, 1988). In that case, the Florida Supreme Court held that, even though the State's tax granting preferential treatment to alcoholic beverages made from Florida's crops and manufactured and bottled in Florida is unconstitutional under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the holding should be prospective only because of Florida's alleged "good faith reliance on a presumptively valid statute." *See also Penn Mutual Life Insurance Co. v. Department of Licensing and Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (Mich. App. 1987) and *Metropolitan Life Insurance Co. v. Commisisoner of Insurance*, 373 N.W.2d 399 (N.D. 1985), which both held that the Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), invalidating a provision taxing foreign insurers, should apply on a prospective-only basis.[15]

McKesson, *Ashland Oil*, and *American Trucking Associations*—especially when viewed in conjunction with the case at hand—vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policy underlying the Com-

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[15] For a list of other cases in which state courts have applied decisions that a tax is unconstitutional on a prospective-only basis, see Tatarowicz, *supra*, 41 Tax Lawyer at 117-18 n.89.

merce Clause or for the precedents of this Court. State after state has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the Commerce Clause's proscription on discriminatory tax statutes. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State then declares that the decision established a "new principle" and, therefore, that it should receive prospective-only application. As a result, all taxpayers (with the possible exception of the victorious litigant) lose.

Such adroit reading of precedent and deft, self-serving application of *Chevron* may enrich the particular State's fisc, but the results can hardly be said to foster the policy underlying the Commerce Clause. If not clarified, the decision below might not only lead States to be less sensitive to Commerce Clause concerns but also discourage taxpayers from challenging clearly discriminatory tax statutes. These facts remain:

- The enactment of discriminatory taxes violates the Constitution.
- The collection of discriminatory taxes violates the Constitution.
- The retention of discriminatory taxes violates the Constitution.

Concededly, the question of the refund of unconstitutionally imposed and collected taxes is one of remedy that is properly addressed in the first instance by state courts. *Tyler Pipe*, 107 S. Ct. at 2822-23. The remand from this Court in such cases, however, invariably requires that the lower court's disposition of the remedy question be "not inconsistent with this opinion." 107 S. Ct. at 2823. The wave of prospective-only holdings that have ensued fail the test of consistency—with respect both to the Commerce Clause and the Court's teaching in *Chevron*. It should be stopped.

IV.

Amicus Tax Executives Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause.

Last term in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court considered—and found constitutionally repugnant—the racially discriminatory use by prosecutors of peremptory challenges. Declaring that "[t]he time for toleration has come to an end," 107 S. Ct. at 714, *quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982), the Court concluded that generally new rules for the conduct of criminal prosecutions will be applied retroactively to all pending or non-final cases even if they constitute a "clear break" with the past. 107 S. Ct. at 716. *See* L. Tribe, *American Constitutional Law* 31 n.26 (2d ed. 1988).

Although cases addressing the validity of discriminatory state tax statutes do not involve considerations of the same magnitude as those presented in criminal procedural cases (which pertain to the life and liberty of the defendant), such cases do implicate a constitutional right—an interstate business's right under the Commerce Clause to be free from undue state-imposed burdens. Thus, they involve rights different from, and indeed more significant than, those presented in *Chevron*.[16]

Perhaps more important, unlike the other civil cases in which the retroactivity issue has been considered, the unsuccessful litigant in a discriminatory state tax case—the party who seeks to have the finding of unconstitutionality applied on a prospective-only basis (the State)—is the progenitor of the proscribed (unconstitutional) ac-

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[16] *See* note 6, *supra*.

tion.[17] The States have it within their power to enact constitutional tax statutes. This fact alone suggests that the States should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. They should not be permitted to reap the benefits of discriminatory taxation. The States' checkered history in enacting, collecting, and refusing to refund unconstitutional taxes only underscores this conclusion. As this Court stated in *Griffith*, "[t]he time for toleration has come to an end." 107 S. Ct. at 714.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction in this case and resolve the substantial issues raised by the decision of the court below.

Respectfully submitted,

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[17] *See* note 11, *supra*, and accompanying text.